TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 61

HARRY F. MEILINK, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF UNITED LAMP & SHADE CORPORATION, BANKRUPT, PETITIONER,

vs.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

No. 9501

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

HARRY F. MELINK, as Trustee in Bankruptcy of the Estate of UNITED LAMP & SHADE CORP., a Corporation, Bankrupt.

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Agreed Statement of the Case	1
Exhibits to Statement of the Case:	
A—Proof of Priority Claim for Taxes	6
A(1)—Trustee's Objection to Priority Tax Claim	7
B—Opinion and Order on Trustee's Objection to Proof of Priority Claim	9
C—Petition to Review Order of Referee	15
D—Certificate and Report of Referee on Petition to Review Order of Referee	18
E—Order Approving Certificate and Report of Referee on Petition to Review Order of Referee	24
Appeal:	
Order Allowing	28
Statement of Points on	24
Certificate and Report of Referee on Petition to Review Order of Referee	18

Page

Certificate of Clerk to Transcript of Record 26

Objection of Trustee to Priority Tax Claim 7

Opinion and Order on Trustee's Objection 9

Order Allowing Appeal 28

Order Approving Certificate and Report of Referee on Petition to Review Order of Referee 24

Petition to Review Order of Referee 15

Proof of Priority Claim for Taxes 6

Statement of Points on Appeal 24

Proceedings in U. S. C. C. A., Ninth Circuit 31

Order of submission 31

Order directing filing of opinion and decree 31

Opinion, Wilbur, J. 32

Decree 44

Order denying petition for rehearing 45

Order staying issuance of mandate 46

Clerk's certificate 47

Order allowing certiorari 48

In the District Court of the United States, Northern District of California, Southern Division

No. 28590 S

In Bankruptcy

In the Matter of

UNITED LAMP AND SHADE CORP.,

a corporation,

Bankrupt.

AGREED STATEMENT OF CASE UNDER RULE 76

The Unemployment Reserves Commission has been and is a duly appointed and acting administrative agency of the State of California created by and exercising the powers conferred upon it by the public statute of the State of California known as Chapter 352 of the Statutes of 1935, as amended (Deering Act No. 8780d) also known as the Unemployment Reserves Act. Effective September 19, 1939, the title of said commission was changed to California Employment Commission (Chapter 1089, Stats. 1939), and the title of said Act was changed to Unemployment Insurance Act (Chapter 564, Statutes of 1939).

The United Lamp and Shade Corp., a corporation, was adjudicated a bankrupt under the provisions of the Federal Bankruptcy Act (Title 11, U. S. C.) on May 6, 1937, and Mr. Harry F. Meilink was duly appointed trustee. With respect to its

operations during the entire calendar year 1936, said corporation qualified as an employer subject to [1*] the contributory provisions of said Unemployment Reserves Act.

On September 15, 1937, there was filed in the above entitled bankruptcy proceedings on behalf of said Unemployment Reserves Commission a proof of priority claim for taxes in the amount of $822.40 together with interest thereon at the rate of 12 per cent per annum. A copy of said proof of priority claim is attached hereto marked "Exhibit A" and is incorporated herein by reference. On or about February 23, 1939, the trustee paid to said Unemployment Reserves Commission the sum of $936.35 in payment of the principal of said priority claim, with interest thereon at the rate of 6 per cent per annum.

Section 45 of said Unemployment Reserves Act (Chap. 352, Statutes of 1935) read as follows:

> "If any employer defaults in any payment required of him, for himself or on behalf of employees under this Act, he shall become additionally liable for interest on such payments at the rate of twelve per cent per annum from the date such payment becomes due, both principal and interest being payable in the same manner as the contributions. Such payment and interest shall be collectible in the name of the fund in any manner practicable, including civil action

*Page numbering appearing at foot of page of original certified Transcript of Record.

by the commission against the defaulting employer."

The rate of interest on delinquent contributions as provided for in said Section 45 remained unchanged until September 19, 1939, at which time said rate of interest was changed to one per cent per month or fraction thereof (Chap. 630, Stats. 1939). [2]

On or about March 30, 1939, there was filed on behalf of the said trustee in bankruptcy a verified objection to the proof of priority claim filed on behalf of said Unemployment Reserves Commission. A copy of said written objection is attached hereto marked "Exhibit A(1)" and is incorporated herein by reference. In said objection it was alleged, in substance, that said trustee has paid the principal amount of said claim with interest thereon at the rate of 6 per cent per annum, that interest at the rate of 12 per cent per annum constitutes a penalty within the purview of Section 57j of the Bankruptcy Act (11 U. S. C. A., P. 93j); and that said trustee refuses the payment of any interest in excess of the rate of six per cent per annum.

Thereafter, counsel representing the interested parties submitted authorities in support of their respective contentions. On November 18, 1939, Hon. Burton J. Wyman, Referee in Bankruptcy, issued his opinion and order, sustaining the objection of the trustee that interest at 12 per cent per annum constitutes a penalty, but requiring the trustee to pay to said Unemployment Reserves Commission

an additional one per cent per annum. A copy of said opinion and order of the Referee is attached hereto marked "Exhibit B" and is incorporated herein by reference.

Thereafter, on November 27, 1939, and within the time provided by law, there was filed on behalf of said Unemployment Reserves Commission a verified petition to review order [3] of referee. A copy of said petition to review is attached hereto marked "Exhibit C" and is incorporated herein by reference.

Thereafter, on February 9, 1940, said referee filed with the Clerk of the above entitled Court a Certificate and Report of the Referee on Petition of Unemployment Reserves Commission of the State of California to Review Order of Referee. In order to avoid repetition, a copy only of that portion of said Certificate and Report entitled "Supplemental Decision By And Opinion of Referee" is attached hereto marked "Exhibit D" and is incorporated herein by reference.

The matter came on regularly before the above entitled Court on February 19, 1940, at which time counsel for the interested parties agreed to submit the matter on the record and briefs. The brief on behalf of the Unemployment Reserves Commission was duly filed February 28, 1940, and the brief on behalf of the trustee was duly filed on March 5, 1940.

Thereafter, on March 18, 1940, the above entitled Court made and entered its Order approving and

confirming the Certificate and Report of the Referee and the Order of the Referee dated November 18, 1939. A copy of said Order is attached hereto marked "Exhibit E" and incorporated by reference herein. [4]

Respectfully submitted,
EARL WARREN,
Attorney General of the State of California
JOHN J. DAILEY,
Deputy
MAURICE P. McCAFFREY
GLENN V. WALLS
By MAURICE P. McCAFFREY
Counsel for Unemployment Reserves Commission of the State of California,
Petitioner and Appellant

Approved by
DINKELSPIEL & DINKELSPIEL
GRANT H. WREN
Attorneys for Trustee

Approved, this 18 day of April, 1940.
A. F. ST. SURE

Receipt of a copy hereof is acknowledged the 18th day of April, 1940.
DINKELSPIEL & DINKELSPIEL
GRANT H. WREN
Attorneys for Trustee [5]

EXHIBIT A

[Title of District Court and Cause.]

PROOF OF PRIORITY CLAIM FOR TAXES

Employer's Registration No. 1B-2996

On the 14th day of September, 1937, came Forrest M. Hill and made oath and said:

1. That he is one of the authorized and acting agents of the California Unemployment Reserves Commission, and as such he is qualified and empowered to make this claim on behalf of the said Commission;

2. That he is informed and believes the said United Lamp & Shade Corporation, Bankrupt, was, at or before the filing of the bankruptcy petition, and is now justly and truly indebted to the State of California in the sum of eight hundred twenty-two 40/100 Dollars ($822.40);

3. That the consideration of the debt is a tax duly levied and assessed under the provisions of the California Unemployment Reserves Act (Stats. 1935, Chapter 352), and interest itemized as follows:

12% per annum on $324.00 from August 1, 1936, to date of payment [6]

12% per annum on $180.24 from November 1, 1936, to date of payment

12% per annum on $318.16 from January 21, 1937, to date of payment

4. That this claim is entitled to the PRIORITY provided by Sec. 64-a of the Bankruptcy Act;

5. That the due date for the said tax is past;

that no part of the said tax has been paid except as above stated; that there are no set-offs or counterclaims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax or interest or penalty whatever, EXCEPT as follows:

Subscribed and sworn to before me this 14th day of September, 1937.

AMY B. WARNER

Notary Public in and for the County of Sacramento, State of California.

FORREST M. HILL

Unemployment Reserves Commission

Make all checks payable to California Unemployment Reserves Commission at Sacramento, California. [7]

EXHIBIT A(1)

[Title of District Court and Cause.]

TRUSTEE'S OBJECTION TO PRIORITY TAX CLAIM

To the Honorable the District Court of the United States for the Northern District of California and to Burton J. Wyman, Esq., Referee in Bankruptcy at San Francisco, California:

Now comes your petitioner, Harry F. Meilink, and respectfully represents:

That he is the duly qualified and acting Trustee

of the above named bankrupt corporation;

That California Unemployment Reserves Commission has filed its Proof of Claim in the above proceeding demanding priority in payment of the sum of $822.40 and interest at the rate of 12% per annum thereon to date of payment;

That your petitioner has paid the principal amount of said Proof of Claim and interest thereon at the rate of 6% per annum as the reasonable and customary rate of interest for the forbearance of any sum of money owed a creditor;

That said creditor predicates its demand for interest at the rate of 12% per annum pursuant to the provisions of Chapter [8] 352 of the 1935 Statutes of California, Section 45, making an employer defaulting in payments required by him under said Statute additionally liable for interest on such payments at the rate of 12% per annum;

That upon the ground that a demand for the payment of interest at 12% per annum constitutes a penalty within the purview of Section 57j of the Bankruptcy Act your petitioner refused to make payment of any sum in excess of 6%;

Wherefore, your objecting Trustee prays that the Proof of Claim of said California Unemployment Reserves Commission be reconsidered and that upon the hearing of the within Objection that an Order be made and entered disallowing payment of interest on the said sum of $822.40 in excess of 6% per annum on said amount.

HARRY F. MEILINK
Objecting Trustee [9]

State of California,
City and County of San Francisco—ss.

Harry F. Meilink, being duly sworn, deposes and says:

That he is the petitioner named in the foregoing Objection to Priority Tax Claim; that he has read said Objection and that the same is true to the best of his knowledge and belief.

.....

Subscribed and Sworn to before me this ..... day of March, 1939.

.....

Notary Public in and for the City and County of San Francisco, State of California. [10]

EXHIBIT B

[Title of District Court and Cause.]

OPINION AND ORDER ON TRUSTEE'S OBJECTION TO PROOF OF PRIORITY CLAIM FOR TAXES FILED BY UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA.

A proof of priority claim for taxes was filed herein by the Unemployment Reserves Commission of the State of California, represented by Hon. Earl Warren, Attorney General, Albert F. Zangerle, Deputy, Maurice P. McCaffrey and Samuel L. Gold. In the claim it is alleged, in substance, that the

bankrupt estate herein is justly and truly indebted to said state in the sum of $822.40. The alleged "consideration of the debt is a tax duly levied and assessed under the provisions of the California Unemployment Reserves Act (Stats. 1935, Chapter 352), and interest, itemized as follows, [11] 12% per annum on $324.00 from August 1, 1936 to date of payment, 12% per annum on $180.24 from November 1, 1936 to date of payment, and 12% per annum on $318.16 from January 21, 1937 to date of payment," it being further alleged in said claim,

"That this claim is entitled to the PRIORITY provided by Sec. 64-a of the Bankruptcy Act."

The trustee in bankruptcy herein, represented by Grant H. Wren, Esq., assisted by James M. Conners, Esq., and Messrs. Dinkelspiel & Dinkelspiel, meets this claim with a written objection wherein it is alleged, in substance, that said trustee has paid the principal amount of said claim with interest thereon at the rate of 6% per annum as the reasonable and customary rate of interest for the forbearance of any sum owed a creditor and that interest at the rate of 12% per annum constitutes a penalty within the purview of Section 57j of the Bankruptcy Act. (11 USCA, (93j), and hence said trustee refuses the payment of any interest in excess of the 6% per annum on said amounts, paid as aforesaid. The facts being undisputed, the matter resolves itself into a pure legal question based for the most part on statutory construction.

So much of Section 64-a of the Bankruptcy Act (11 USCA, (104-a), as is necessary to this discus-

sion provides, "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof * * *", the pertinent part of [12] paragraph (b) adding, "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (6) taxes payable under paragraph (a) hereof * * *"

Section 57j of the Bankruptcy Act (11 USCA. (93-j), upon which, supported by certain decisions, the trustee relies for the soundness of his contention, declares, "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Section 45 of the statute upon which the State of California basically relies for the authority to collect the claimed amounts, provides, "If any employer fails to make any payment required of him, or fails to deduct and pay to the commission the contributions of his workers, in accordance with the provisions of this act and of the rules and regulations adopted by the commission, he shall become additionally liable for interest on such payments at

the rate of twelve per cent per annum from the date such payment becomes due, both principal and interest being payable in the same manner as the contributions. Such payment and interest shall be collectible in the name of the commission [13] in any manner practicable, including civil action by the commission against the defaulting employer."

With the above cited sections of the Bankruptcy Act and the section of the applicable law of the State of California before it, this court must determine whether or not any portion of the claimed 12% is a penalty. In so doing, the court must, of necessity, deal with property rights belonging to said bankrupt estate, and "* * * where", as was said in Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 10, 44 S. Ct. 232, 234, 68 L. Ed. 533, 536, "the Bankrupt Law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts * * *."

Recognizing the rule just cited as being binding upon the court in this proceeding, I am of the opinion that, as to whether or not the "12% interest" is in fact "interest" or a "penalty", the answer to the question is to be found in Powell v. Allan,* 70 Cal. App. 663, 672, 234 Pac. 339, 343. In that case, it was said, "Where, under the guise of 'in-

*PETITION TO HAVE CAUSE HEARD IN SUPREME COURT OF CALIFORNIA DENIED.

terest', a sum is exacted of a DELINQUENT† property owner, such sum, though denominated 'interest', is in fact a penalty—as was held in the Oregon supreme court in Colby v. Medford, 85 Or. 485 (167 Pac. 487). There the court said that 'when interest is charged on a delinquent tax, it is not regarded as interest in the sense that it is a consideration for the [14] forbearance of money, but it is deemed to be a penalty.' "‡

Accepting and following the holdings of the highest courts of the State of California that the charges for so-called "interest" in statutes of the character of the state statute here under consideration are in fact and in law "penalties", yet, under the provisions of Section 57j of the Bankruptcy Act (11 USCA, (93-j), this court can, and should, allow "the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose * * *", which, upon the record presented herein, I am of the opinion ought not to exceed the legal rate of interest in the State of California, i. e., "seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or shorter time * * *" LXXXIII, 1919 Stat. To hold otherwise as regards both the penalty and compensation-for-pecuniary-loss theory hereinbefore set forth, in my opinion, would be violative of a well recognized

---

†Emphasis in this Opinion Referee's.

‡Copy of Attorney General's opinion of April 27, 1939, omitted.

rule, i. e., "In the construction of a statute it is assumed that the legislature knew the existing laws, and that it had knowledge of existing judicial decisions, and enacted statutes in the light of such decisions as have a direct bearing upon them." Robertson v. Longford, 95 Cal. App. 414, 424, 273 Pac. 150, 153, 154. [15]

Ordered: (1) That insofar as the trustee objects to the payment of any penalty is concerned, said objection, except as hereinafter provided, may be, and it is SUSTAINED, (2) that insofar as the trustee objects to making any payment upon said claim in excess of the 6% per annum is concerned, said objection may be, and it is, OVERRULED, and (3) that said trustee is hereby directed to, and he will, pay to the Unemployment Reserves Commission on behalf of the State of California, the additional one per cent per annum on the three amounts set forth in the proof of priority claim, as to which said amount of one per cent per annum ONLY said priority claim is hereby ALLOWED, said claim being hereby DISALLOWED in all other particulars.

Dated: November 18, 1939.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed]: Filed Nov. 18, 1939. Burton J. Wyman, Referee in Bankruptcy, Special Master. [16]

EXHIBIT C

[Title of District Court and Cause.]

PETITION TO REVIEW ORDER OF REFEREE

To the Honorable, Burton J. Wyman, Referee in Bankruptcy:

The petition of your petitioner respectfully shows as follows:

That petitioner, Unemployment Reserves Commission of the State of California, is a creditor of the estate of United Lamp & Shade Corporation, the above named bankrupt; that petitioner filed a proof of priority claim for taxes under Section 64-a of the Bankruptcy Act, (11 U. S. C. A. 104-a), showing that the bankrupt estate is indebted to petitioner in the sum of $822.40, together with interest itemized as follows, 12% on $324.00 from August 1, 1936, to date of payment, 12% per annum on $180.24 from November 1, 1936, to date of payment, 12% per annum on $318.16 from January 21, 1937, to date of payment; [17]

That the trustee in bankruptcy paid the principal sum of said claim with interest thereon at 6% per annum;

That in the course of the proceedings on the 18th day of November, 1939, an order was made disallowing interest on petitioner's claim in excess of seven per cent per annum, and ordering trustee to pay an additional one per cent per annum to that of the six per cent per annum already paid;

That the order complained of is as follows:

> "Ordered: (1) That insofar as the trustee objects to the payment of any penalty is concerned, said objection, except as hereinafter provided, may be, and it is, SUSTAINED, (2) that insofar as the trustee objects to making any payment upon said claim in excess of the 6% per annum is concerned, said objection may be, and it is, OVERRULED, and (3) that said trustee is hereby directed to, and he will, pay to the Unemployment Reserves Commission on behalf of the State of California, the additional one per cent per annum on the three amounts set forth in the proof of priority claims, as to which said amount of one per cent per annum ONLY said priority claim is hereby ALLOWED, said claim being hereby DISALLOWED in all other particulars."

That it is respectfully submitted such order was and is erroneous, in that petitioner's claim for interest should have been allowed in the full amount of twelve per cent per annum, and that the trustee should have been ordered to pay the additional sum of six per cent per annum to that of the six per cent per annum already paid, by virtue of the fact that the amount of interest claimed in excess of seven per cent per annum is not a penalty, but interest, and designated as such in the California Unemployment Reserves Act. [18]

See:

United States vs. Childs, 266 U. S. 304, 5 A. B. R. (NS) 5

Horn vs. Boone County, 44 F. 2nd 920, 16 A. B. R. (NS) 615

In re Beardsley and Wolcott Mfg. Co., 82 F. 2nd 239, 31 A. B. R. (NS) 33

Also see recent annotation on this subject appearing in Volume 104, A. L. R., at page 881.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in Section 39(c) of the Federal Bankruptcy Act.

Dated: November 25, 1939.

EARL WARREN,
Attorney General
ALBERT F. ZANGERLE,
Deputy
MAURICE P. McCAFFREY
SAMUEL L. GOLD,
Of Counsel,
By SAMUEL L. GOLD
Attorneys for Petitioner

State of California,
County of Sacramento—ss.

Samuel L. Gold, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner herein, and that he has read the foregoing petition

for review, and that the contents thereof are true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to such matters he believes them [19] to be true.

SAMUEL L. GOLD

Subscribed and sworn to before me, this 25th day of November, 1939.

[Seal] AMY B. WARNER

Notary Public in and for the County of Sacramento, State of California. [20]

EXHIBIT D

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE ON PETITION OF UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA TO REVIEW ORDER OF REFEREE.

To Honorable A. F. St. Sure, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court and the referee in charge of this bankruptcy proceeding, respectfully certify and report:

* * * * * * *

Supplemental Discussion By and Opinion of Referee

I. The only point made in the petition for review is "that petitioner's claim for interest should

have been allowed in the full amount of twelve per cent per annum, and that the trustee should have been ordered to pay the additional sum of six per cent per annum to that of the six per cent already paid, BY VIRTUE OF THE FACT THAT THE AMOUNT OF INTEREST CLAIMED IN EXCESS OF SEVEN PER CENT PER ANNUM [21] IS NOT A PENALTY, BUT INTEREST, AND DESIGNATED AS SUCH IN THE CALIFORNIA UNEMPLOYMENT INSURANCE ACT."*

The answer to such contention is simple: Merely because the legislature of the State of California saw fit to use the word "interest" to designate the additional amount made payable under certain conditions provided for in the statute under discussion herein, does not, in anywise, bind a federal court so to interpret the word if, in fact, the legislature has given a misnomer to said amount, considered as a whole, or in part. As was said by the Supreme Court of the United States, in discussing the distinction between a "tax" and a "penalty", United States v. LaFranca, 282 U. S. 568, 572, 51 S. Ct. 278, 280, 75 L. Ed. 551, 555, "No mere exercise of the art of lexicography can alter the essential nature of the act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such," which is but another way of declaring the rule announced by the court in Powell v. Allan, supra.

---

*Emphasis referee's.

II. In citing United States v. Childs, 266 U. S. 304, 45 S. Ct. 110, 69 L. Ed. 299, Horn v. Boone County, 44 F. (2d) 920, In re Beardsley & Wolcott Mfg. Co., 82 F. (2d) 239, counsel for the petitioner for review seemingly have overlooked the rule found in Wright v. Nagle, 101 U. S. (XI Otto) 791, 796, 797, 25 L. Ed. 921, 923, i. e., "The language of the court in the opinion is to be construed with reference to [22] the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case,"—a rule which is consistently followed by federal courts when considering the applicability of the language of former decisions to the facts involved in the cases then before them. Nothing is more certain than is the fact that in none of the cases cited by counsel in support of the petition for review was the court dealing with a question involving the acts or language of a legislative body so limited in its authority as was the legislature of the State of California when it purported to fix an interest rate of twelve per cent per annum WITHOUT THE AGREEMENT OF THOSE AGAINST WHOM SUCH AN INTEREST RATE LAWFULLY COULD BE CHARGED.

"Interest is the compensation allowed by law or FIXED BY THE PARTIES* for the use, or forbearance, or detention of money." California Civil Code, Sec. 1915. "The rate of interest upon the

*Emphasis referee's.

loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be SEVEN DOLLARS UPON THE ONE HUNDRED DOLLARS FOR ONE YEAR* and at that rate for a greater or less sum or for a longer or a shorter time; BUT IT SHALL BE COMPETENT FOR PARTIES TO CONTRACT FOR THE PAYMENT AND RECEIPT OF A RATE OF INTEREST NOT EXCEEDING TWELVE DOLLARS ON ONE HUNDRED DOLLARS FOR ONE YEAR* and not exceeding that rate for a greater or less sum or for a longer [23] or shorter time, IN WHICH CASE SUCH RATE EXCEEDING SEVEN DOLLARS ON ONE HUNDRED DOLLARS SHALL BE CLEARLY EXPRESSED IN WRITING."* LXXXIII, 1919 Stat. It therefore follows that while an interest rate not to exceed twelve per cent per annum lawfully could be fixed by the parties affected thereby, no legal rate of interest can be fixed by the legislature of the State of California in excess of seven per cent per annum, without the agreement of all parties concerned. Consequently, when such legislature undertook to establish the twelve per cent rate, in the absence of an agreement on the part of those affected by such higher rate, the legislative act was an attempt to amend the above cited statute, adopted by the people of the State of California in the exercise of their constitutional initia-

*Emphasis referee's.

tive power. In the language of Penziner v. West American Finance Co., 10 Cal. (2d) 160, 171, 74 Pac. (2d) 252, 257, "It should be here mentioned that the usury law was adopted as an initiative measure and inasmuch as it contains no provision permitting its amendment by the legislature, the act can be amended or repealed only 'by a vote of the electors.' (California Constitution, art. IV, sec. 1.)"

While a ruling of this nature may seem startling, at first glance, its only effect is to curtail the percentage of interest which can be collected under the Bankruptcy Act, under the conditions present herein. However, the State of [24] California, in the administration of its own affairs, without the jurisdiction of the bankruptcy court, is not thus handicapped, inasmuch as "the power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions." In re Madera Irrigation District, 92 Cal. 296, 324, 28 Pac. 272, 279. Hence, regardless of whether the sum added over and above the tax proper be called, or in fact be, "interest" or "penalty", no person concerned, unless bankruptcy has intervened, can be heard to complain, for the reason that ". . . the imposing of penalties for the nonpayment of a tax is a legislative function . . ." Ducey v. Dambacher, 24 Cal. App. (2d) 429, 433, 75 Pac. (2d) 98, 100.

III. In the light of the foregoing rulings by the highest courts of the State of California, it is interesting to note the careful discrimination in the

use of words in the letter of the state attorney general, above quoted in its entirety, wherein this twelve per cent rate was referred to as "the interest penalty". Moreover, it is not amiss to add that the careful choice of words in this regard also shows a familiarity with at least one set of statute-qualifying decisions by the state's highest courts which, so far as this particular subject is concerned, speaks volumes for the efficiency of those entrusted with the performance of the important duties resting upon the shoulders of California's Attorney General and his assistants. [25]

Papers Handed Up Herewith

I hand up herewith the following papers:

1. Proof of Priority Claim for Taxes;
2. Trustee's Objection to Priority Tax Claim;
3. Opinion and Order on Trustee's Objection to Proof of Priority Claim for Taxes Filed by Unemployment Reserves Commission of the State of California; and
4. Petition to Review Order of Referee.

Dated: February 9th, 1940.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy. [26]

EXHIBIT E

[Title of District Court and Cause.]

ORDER

Ordered that the "Certificate and Report of Referee on Petition of Unemployment Reserves Commission of the State of California to Review Order of Referee," filed herein on February 9, 1940; and the Referee's order of November 18, 1939, as to which the review is sought, be and the same are hereby Approved and Confirmed.

Dated: March 18, 1940.

A. F. ST. SURE
United States District Judge.

[27]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY UNEMPLOYMENT RESERVES COMMISSION, APPELLANT.

1. That the Referee in the above entitled bankruptcy proceedings erred in sustaining the objection of the trustee that interest at the rate of twelve per cent per annum on delinquent contributions or taxes included in the proof of priority claim of the Unemployment Reserves Commission pursuant to Section 45 of the Unemployment Reserves Act constituted a penalty in bankruptcy within the purview of Section 57j of the Bankruptcy Act (Title 11, U.S.C. P. 93j).

2. That the Referee in the above entitled bankruptcy proceedings erred in failing to order the trustee to pay to the Unemployment Reserves Commission on behalf of the State of California the full amount of interest included in said proof of priority claim of said Unemployment Reserves Commission.

3. That the District Court erred in approving and confirming the "Certificate and Report of Referee on Petition of Unemployment Reserves Commission of the State of [28] California to Review Order of Referee" as filed on February 9, 1940, and the Referee's order dated November 18, 1939.

Respectfully submitted,
EARL WARREN,
Attorney General of the State of California
JOHN J. DAILEY,
Deputy
MAURICE P. McCAFFREY
GLENN V. WALLS
By MAURICE P. McCAFFREY
Counsel for Unemployment Reserves Commission,
Appellant

[Endorsed]: Filed Apr. 18, 1940. Walter B. Maling, Clerk.

[Title of Cause.]

United States of America
Northern District of California
City and County of San Francisco—ss.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be a full, true, and correct copy of the original Agreed Statement of Case Under Rule 76, filed Apr. 18, 1940, in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of April A. D. 1940.

[Seal] WALTER B. MALING
Clerk of the United States District Court, Northern District of California.

By J. P. WELSH
Deputy Clerk. [29]

[Endorsed]: No. 9501. United States Circuit Court of Appeals for the Ninth Circuit. Unemployment Reserves Commission of the State of California, Appellant, vs. Harry F. Meilink, as Trustee in Bankruptcy of the Estate of United Lamp & Shade Corp., a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 19, 1940.

PAUL P. O'BRIEN,

Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term A. D. 1939, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-second day of April in the year of our Lord one thousand nine hundred and forty.

Present:

Honorable Francis A. [illegible]arrecht, Circuit Judge, Presiding,

Honorable Bert Emory Haney, Circuit Judge,

Honorable William Healy, Circuit Judge.

No. 9501

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

HARRY F. MEILINK, As Trustee in Bankruptcy,

Appellee.

ORDER ALLOWING APPEAL

Upon consideration of the petition for allowance of appeal, filed April 18, 1940, and good cause therefor appearing, It Is Ordered that the petition be, and hereby is granted;

It Is Further Ordered that the appellant present for approval and filing bond in the sum of $250.00 within 10 days from date. [30]

No. 9501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

HARRY F. MEILINK, as Trustee in Bankruptcy of the Estate of UNITED LAMP & SHADE CORP., a Corporation, Bankrupt,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 549 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, November 13, 1940.

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. Glenn V. Walls, counsel for appellant, and by Mr. James M. Connors, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, December 12, 1940.

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: Wilbur, Garrecht and Healy, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from an order of the bankruptcy court denying a claim for a portion of the interest included in the appellant's claim for taxes or "contributions" to unemployment reserves and for interest thereon due to it as an agency of the state of California. The amount of the "contribution" by the appellant was $822.40 in 1937. The trustee paid $936.35, principal and interest, on February 13, 1939. The amount of unpaid interest (5%) was $156.00. The trustee filed objections to the claim of priority for the balance of the unpaid interest (6%) which he objected to on the ground that it constituted a penalty within the meaning of §57 (j) of the Bankruptcy Act (11 U. S. C. A. §93 (j)) prohibiting approval of claims of states for penalties in greater amounts than the loss incurred by the debtor's default.[1] The referee in bank-

[1]Sec. 57 (j) of the Bankruptcy Act (11 U. S. C. A. §93 (j)): "Debts owing to the United States or to any state or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act,

ruptcy sustained the objection of the trustee as to five per cent but allowed one per cent additional, making the total allowance of seven per cent on said overdue "contributions", or taxes. The District Court affirmed the order of the referee and this court allowed the appeal, the amount of interest involved being less than $500. (28 U. S. C. A. §24 (a), 30 (a).

The California statute fixing the tax, or "contribution" (Cal. Stats. 1935, ch. 352, §45; Deerings General Laws of 1937, Act 8780 (d)) provides for the payment of interest thereon as follows:

"If any employer fails to make any payment required of him, or fails to deduct and pay to the commission, the contributions of his workers in accordance with the provisions of this act, and of the rules and regulations adopted by the commission, he shall become additionally liable for interest on such payments at the rate of 12% per annum from the date such payment becomes due, both principal and interest being payment in the same manner as the contribution. Such payment and interest shall be collectible in the name of the Commissioner in any manner practicable, including civil action by the Commissioner against the defaulting employer."

There is no justification on the face of the California statute for treating the 12% as anything other than interest. It is so characterized in the

---

transactions, or proceedings out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

statute and the amount payable depends upon the lapse of time between the accrual of the obligation and its payment, which lies wholly in the control of the taxpayer. The Supreme Court, in the case of United States v. Childs, 266 U. S. 304, had occasion to construe the provisions of the Bankruptcy Act (§57 (j), 11 U. S. C. A. §93 (j)) with reference to the allowance of interest upon income taxes which was claimed to be excessive and therefore a penalty. The United States statute imposing the income tax (Sec. 14 (a) T. I., part II, Revenue Act 1916) there under consideration, provided that: "* * * after ten days' notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due."

The government conceded that the five per cent charge was a penalty and, consequently, was not payable by the bankrupt's estate, but it urged its claim for the charge of one per cent per month as interest. The referee therein had held that the one per cent per month interest, as well as the five per cent charge, was a penalty and, therefore, was not a claim which could be allowed against the estate under the provisions of §57 (j) of the Bankruptcy Act. He allowed six per cent interest only. The District Court and the Circuit Court of Appeals affirmed this order for the same reason but the Supreme Court reversed its decision and held that the government was entitled to have its claim allowed

for the one per cent per month designated as interest on the revenue law imposing the tax (§14a, supra). In ruling upon the question the court said: "A penalty is a means of punishment; interest a means of compensation. Bouvier defines it to be 'a consideration paid for the use of money or for forbearance in demanding it when due.'

"The imposition of a tax is certainly a function of government and creates an obligation, and the power that creates the obligation can assign the measure of its delinquency—the detriment of delay in payment; and §14 (a) has done so in this case, and explicitly done so. Five per centum penalty is the cost of delinquency, and interest upon the amount due at 1% per month—12% a year. There is no ambiguity in the declaration nor the distinction made. * * * The Circuit Court of Appeals considered that the 1% was involved as well, as being in effect penalty and not saved by its name, though it was imposed by the legislature and within the legislative power, and notwithstanding that taxes are treated as debts within the meaning of the Bankruptcy Act. * * *

"The Circuit Court of Appeals adjudged the tax in the present case a debt and assigned against it interest at 6%; the court considering that that interest was compensation for the delinquency, anything in excess becoming penalty and within the prohibition of §57-j. The court said, 'On the point at bar [one per cent interest as the price of the delay being penalty] we are in accord with Re Ashland, etc.,

229 Fed. 829, and hold that there being no evidence of any injury or damage to the government by the withholding of this tax except that which flows from the non-payment of a just debt, anything in excess of the legal rate of interest is to be treated as a penalty and not allowed.'

"We are unable to concur. It makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the government, 6%, in the middle West 8% and on the Pacific coast 10%,—and abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation. Besides, the federal statute is precise, and it is made peremptory by the distinction between 'penalty' and 'interest', and if it may be conceded that the use of the latter word would not save it from condemnation if it were in effect the former, it cannot be conceded that 1% per month—12% a year—gives it that illegal effect, certainly not against legislative declaration that is within the legislative power, there being no ambiguity to resolve." The Supreme Court also pointed out that its decision was not inconsistent with its prior decision in New York v. Jersawit, 263 U. S. 493, relied upon by the appellee herein, in that the statute of New York there involved required the corporation to pay the tax plus 10% thereof, plus one per cent per month "for each month the tax remains unpaid". It was there held that the monthly installments must be added to the 10% penalty and must be treated as a part of one corpus and must

fall with it. After pointing out these distinctions the court added: "The tax in this case is one on income; a burden imposed for the support of the government. Interest is put upon it and so denominated, distinguished from the 5% as penalty, clearly intended to compensate the delay in the payment of tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment."

It will be observed that the reasons advanced by the Supreme Court in support of the 12% as a charge of interest and not penalty, were two-fold: first, the matter lay within the legislative power of the government to fix a rate of interest to be charged upon delinquent taxes; and second, that to construe the bankruptcy act so as to permit this statutory rate to be ignored would result in the substitution of a rate which was dependent in each case upon the value of the use of money in the different localities. Both arguments apply with equal force to the 12% interest charge fixed by the legislature of the state of California in the instant case. It is expressly stated to be a rate of interest to be charged and computed as such. To fix a rate of interest other than that fixed by law would be a departure from the legislative mandate in the sphere in which the legislature is supreme. It would also result in equality for not only might a different rate be fixed in different communities in California, but different rates might be fixed in the same community by different referees in bankruptcy or by the same referee

if in his judgment the value of the use of money had fluctuated from time to time in the community in which he was exercising his judicial functions. This decision of the Supreme Court (U. S. v. Childs, supra) has been construed and applied by a number of the Circuit Courts of Appeals.

In the case of In re Semon, 80 F. 2d 81, the Second Circuit had occasion to pass upon the question of the right of the United States to recover 12% as interest upon unpaid income taxes due the government of the United States from the bankrupt. It was sought by the trustee in bankruptcy to distinguish the question there involved from the prior decision of the Supreme Court in United States v. Childs, supra, by pointing out that under later amendments of the Revenue Act different and lesser rates of interest were fixed for other delinquencies. In reply the court pointed out that a similar argument might have been made in United States v. Childs, supra, because of the fact that the statute there under consideration, in dealing with estate taxes (§§204, 207, 39 Stats. 778, 779) provided for interest at varying rates, but the court said: "We are not persuaded that when Congress prescribes different rates of interest for different delinquencies in payment of taxes, the higher rate must necessarily be deemed to include a penalty. Since the higher rate is one within the legislative power to prescribe as interest (United States v. Childs, supra), it may well be argued that Congress regards the higher rate as the normal compensation for de-

lay in payment under the circumstances where it obtains, although willing to accept a lesser compensation for delay under other circumstances. Impositions which were plainly penalties were set apart and dealt with in other sections, and in the sections prescribing interest, the imposition is explicitly declared to be such. This legislative declaration we do not think may be disregarded merely because different sections prescribe different rates." The court cited in support of its conclusion, among others, our decision in Hughson v. United States, 59 F. 2d. 17, 19, which was noted for comparison.

In In re Beardsley & Wolcott Mfg. Co., 82 F. 2d. 239, the Second Circuit Court of Appeals again considered the provisions of §57 (j) of the Bankruptcy Act (11 U. S. C. A. §93 (j)), supra, which is made applicable to reorganization proceedings under §77B (11 U. S. C. A. §207, §1, 48 Stats. 912), with reference to the allowance of interest under a statute of the state of Connecticut, which provided that: "The delinquent portion of any tax shall be subject to interest at the rate of three-fourths of one per cent for each month or fraction thereof which shall elapse from the time when it shall have become due and payable until the same shall be paid; * * *". §380 c of 1931-1933-1935 Supplement to Connecticut Statutes, pp. 145, 146. The court said: "But we are not concerned with the wisdom of the statute. The rates fixed under the taxation and police powers of the state were doubtless governed by mixed financial and social policies. The policies were matters for the

legislature and if it declared any rate which was within the range fixed as compensation for the use of money by private agreement and denominated it 'interest,' we think there should be every presumption that it was such in fact."

The Circuit Court of Appeals for the Eighth Circuit, in Horn v. Boone County, Nebraska, 44 F. 2d. 920, upon the authority of United States v. Childs, supra, held that a statute of the state of Nebraska fixing an interest charge upon taxes was to be regarded as a charge for interest allowable in bankruptcy and not as a penalty to be disallowed. The Nebraska statute there involved provided that after delinquency such taxes "shall draw thereafter 10% per annum, which interest shall be collected the same as tax so due." The court held that inasmuch as Nebraska permitted private agreement to fix as high a rate as 10% interest between private parties, the statute fixing 10% interest upon taxes could not justly be characterized as a penalty. If this rule be applied in California it would follow that 12% is not a penalty because the laws of California permit an even higher rate than 12% per annum with reference to certain types of loans. (Stat. 1919, Cal., LXXXIII; Sec. 22, Art. XX, Cal. Const.)

In In re Martin, 75 F. 2d. 618, the Circuit Court of Appeals for the Seventh Circuit had under consideration a claim of the Director of Finance of the State of Illinois against a bankrupt's estate to recover from a bankrupt distributor of gasoline money which he had collected from the consumers of gaso-

line purchased from him on account of the tax thereon due from them. The court held that the claim was not one for taxes but for debts due by the bankrupt and was entitled to priority under the provisions of §64B (7) of the Bankruptcy Act (11 U. S. C. A. §104B (7)). The statute of the state of Illinois imposing the tax provided that interest at the rate of one per cent per month should be allowed as penalty for wilful delay in payment to the state of the tax collected. The court held that the matter of interest rates was within the power of the state legislature and said: "We find nothing in the record to indicate anything grossly excessive or inequitable in the interest fixed by the statute and carried in the judgment and we are not at liberty to disturb its allowance." It does not appear from the opinion that the attention of the court was directed to the provisions of §57 (j) of the Bankruptcy Act (11 U. S. C. A. §93 (j)). However, a reference to the briefs in the case shows that the appellant therein called the attention of the court to the provisions of §57 (j) of the Bankruptcy Act, supra, and argued that "under no theory should the penalties assessed by the state have been allowed as a part of the claim in this matter". The appellee claimed that although denominated a "penalty" in the statute it "* * * was imposed * * * to compensate the state on account of delay in payment of the tax", citing in support of that proposition People v. Baldwin, 287 Ill. 87, wherein, under a similar state statute, the State Supreme Court held the charge to be interest and not

a penalty. The Circuit Court of Appeals, citing People v. Baldwin, supra, held that the charge of one per cent per month was interest. It did not expressly consider or rule upon the question of whether or not the interest might be so excessive as to constitute a penalty, as such a contention was not presented to it, but it did hold, in effect, that an interest rate of 12% was within the power of the legislature and, consequently, allowable in bankruptcy notwithstanding the provisions of §57 (j), supra, of the Bankruptcy Act.

The only decision by a Circuit Court of Appeals which is at variance with the cases we have discussed is by the Circuit Court of Appeals for the Third Circuit in Pressed Steel Car Co. of New Jersey, 100 F. 2d. 147, which said, with reference to a claim of one per cent per month upon delinquent taxes: "We think that there is no doubt that the interest rate of 1% per month for each month that the tax remains unpaid proposed to be levied by the statute * * * is a penalty." The court cited New York v. Jersawit, 263 U. S. 493, 496, supra, in support of its conclusion, but did not cite or mention the later decision of the Supreme Court in United States v. Childs, supra, in which New York v. Jersawit is explained and limited, nor did it cite the decisions of other Circuit Courts of Appeals above cited.

In view of the controlling decision by the Supreme Court (Childs v. United States, supra) it is unnecessary to cite or discuss a number of decisions

of the District Courts cited to us in which it has been held that the provision for interest upon delinquent taxes imposed by the taxing statutes was a penalty within the meaning of §57 (j) of the Bankruptcy Act (11 U. S. C. A. §93 (j)), supra.[2]

The appellee cites a ruling of the Attorney General of the state referring to the charge in §45, supra, as an "interest penalty". The letter was addressed to the appellant in reply to a question sub-

---

[2]In re Ashland Emery & Corundum Co., 229 F. 829, was overruled by the Supreme Court in Childs v. United States, supra. In re Denver and Rio Grande R. Co., 27 F. 2d 983, the court held 2% per month interest to be a penalty within the meaning of §57 (j) of the Bankruptcy Act, supra, and approved an allowance of 6% only, the statutory rate for interest.

Circuit Judge Evans sitting as District Court Judge in re Adams Building Corp., 27 F. Supp. 247, held that interest penalties and costs on a tax should be reduced to five per cent interest in a reorganization proceeding citing as authority, New York v. Jersawit, 263 U. S. 493, and In re Clark Realty Co., (7 C. C. A.) 253 F. 938; the point was not contested on appeal. In re Adams Bldg. Corp., (C. C. A. 7) 105 F. 2d. 764; cf., In re Martin, (CCA 7) supra; see also, In re A. E. Fountain, 295 Fed. 873, from the U. S. District Court of New York, in effect overruled by later decisions of the Circuit Court of Appeals of the Second Circuit, supra. In re Wells, U. S. District Court of Maryland, 4 F. Supp. 329, no claim was made for interest or penalties on taxes and what is said in reference thereto is obiter. In Powell v. Allen, 70 Cal. App. 663, it is said that interest on delinquent taxes is not interest but a penalty, citing Colby v. Medford, 85 Or. 485. The remark is obiter.

mitted to him as to whether the appellant had power to waive "interest charges" accruing under §45, supra. The attention of the Attorney General was not directed to the provisions of §57 (j) of the Bankruptcy Act, supra.

We regard the letter as without significance in the construction of the Bankruptcy Act of §45, supra.

The decision of the trial court is reversed with instructions to approve the claim for the entire balance of the amount of the interest at 12% fixed by the state statute.

[Endorsed]: Opinion. Filed Dec. 12, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9501

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs

HARRY F. MEILINK, as Trustee, etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed, with instructions to approve the claim for the entire balance of the amount of the interest at twelve percentum fixed by the state statute, with costs in favor of the appellant and against the appellee.

It is Further Ordered, Adjudged, and Decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered December 12, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, March 10, 1941.

Before: Wilbur, Garrecht and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of Harry

F. Meilink, as Trustee in Bankruptcy, etc., filed January 10, 1941, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. James M. Conners, counsel for the appellee, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 30, 1941; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge

Dated: San Francisco, California, April 11, 1941.

[Endorsed]: Filed Apr. 11, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-six (46) pages, numbered from and including 1 to and including 46, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of April, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7481)